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No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied *Kelly* v. *Kosuga*, 385 U.S. 516 (1959), in declining to entertain an antitrust defense raised by an employer in a suit by the trustees of an employee health and retirement fund seeking contributions owed to the fund by the employer.

2. Whether, in a suit brought by trustees seeking contributions to an employee health and retirement fund, the Court of Appeals properly declined, on the ground that unfair labor practice claims fall within the exclusive jurisdiction of the NLRB, to entertain the defense that the agreement requiring payment of those contributions violates Section 8(e) of the National Labor Relations Act.

3. Whether the Court of Appeals properly held that the trustees of an employee health and retirement fund were entitled to reasonable attorneys' fees where the trustees had recovered delinquent contributions due the fund from an employer-contributor in a suit pursuant to ERISA.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

In this case petitioner Kaiser Steel Corporation ("Kaiser") seeks review of the decision of the U.S. Court of Appeals for the District of Columbia Circuit affirming the District Court's granting of summary judgment in favor of the Trustees of the United Mine Workers of America Health and Retirement Funds ("Trustees"). App. 81a-82a.[1] The action was brought by the Trustees to recover health and retirement fund contributions from Kaiser, a signatory employer to the National Bituminous Coal Wage Agreement of 1974

[1] References to the Appendix filed with Kaiser's petition ("Pet.") will be cited as "App. ——"; references to the Joint Appendix filed in the Court of Appeals will be cited as "C.A.J.A. ——."

("1974 Agreement"). Kaiser conceded that the contributions were due according to the terms of its contract, Pet. 2-3, but it resisted payment on the ground that the contract it entered into and never challenged during its term was unlawful. Pet. 3-5. Both Courts below rejected Kaiser's belated attempt to challenge the legality of the contract and ordered payment of the full amount of disputed contributions and attorneys' fees.

A. Kaiser's Obligations Under the 1974 Agreement.

The relevant facts can be simply stated. The 1974 Agreement was a three-year collective bargaining agreement between the International Union, United Mine Workers of America ("UMWA") and various coal operators and associations of coal operators, including the Bituminous Coal Operators Association ("BCOA"). C.A.J.A. 179. Kaiser, as a member of BCOA, became a signatory to the 1974 Agreement. C.A.J.A. 180.

Among other provisions, the 1974 Agreement provided for the establishment and funding of four trusts (collectively referred to as the "Funds") to provide health and retirement benefits for coal miners and their families. Article XX(d) of the Agreement sets forth the methods of measuring the contributions owed by each signatory employer. C.A.J.A. 44-45. Thus, it provided for payments to the various trusts for all coal handled by the employer for use or for sale, whether the coal was produced by the employer or procured or acquired from another company which had not made the required contribution to the Funds. *Id.* The contribution to be paid for produced coal was approximately equivalent to that due on purchased coal under what was known as the "purchase-of-coal clause." C.A.J.A. 181.[2]

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[2] Previous collective bargaining agreements between the UMWA and the employers also contained a clause providing for the payment of contributions on purchased coal. The prior clause, how-

Article XX(d) further provided that it was the responsibility of each signatory employer to report accurately to the Funds, on a monthly basis, the amount of coal produced by the company, the number of hours worked by company employees in producing the coal, and the amount of coal purchased by the company. C.A.J.A. 45. These reports were to be submitted to the Trustees on "remittance advice forms" provided to employers by the Funds. C.A.J.A. 180.

Throughout the term of the 1974 Agreement Kaiser, in compliance with Article XX(d) of the Agreement, reported the amount of coal produced and the number of hours worked by its employees, and paid the appropriate contributions thereon. C.A.J.A. 180. Kaiser failed, however, to report that it was purchasing coal, and failed to pay the required contributions under the purchase-of-coal clause. C.A.J.A. 180-81. Moreover, Kaiser failed to alert the Trustees that it had determined to ignore its purchase-of-coal obligations during the term of the Agreement. C.A.J.A. 181.

Prior to the expiration of the 1974 Agreement, the Trustees received a report of Kaiser's purchases and mounted an investigation. C.A.J.A. 181-82.[3] The Trus-

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ever, required employers to pay twice the amount of the produced coal contribution. This excess charge was sometimes referred to as a "penalty." By fixing the contributions in a way so as to require substantially equal contributions for produced and purchased coal, the parties to the 1974 Agreement eliminated "[w]hatever penalty may have been implicit in the disparity of payments in the earlier clause * * *." App. 4a.

[3] The issue as to when the Trustees learned of Kaiser's purchases is, contrary to the suggestion in Kaiser's petition, a matter of some dispute. The Trustees contend that they did not know anything of Kaiser's purchases until they received a report from a union member in June 1976. C.A.J.A. 181. Kaiser contends that the Trustees knew long before the commencement of the 1974 Agreement and nevertheless chose not to enforce the clause. Pet. at 4. The Court of Appeals assumed, quite properly, that for

tees then demanded payment; when Kaiser refused to pay, this suit was filed. *Id.* Kaiser defended on the ground that the clause was unlawful and hence unenforceable. Specifically, Kaiser asserted that the clause violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(e). C.A.J.A. 73.

This was the first time that Kaiser sought to challenge the legality of the purchase-of-coal clause. One signatory company, however, had endeavored to have the purchase-of-coal clause of the 1974 Agreement declared unlawful during the term of the Agreement. In 1977, U.S. Steel Corporation brought an action against the UMWA and the Trustees for a declaratory judgment that the "purchase-of-coal" clause violated Section 8(e) of the NLRA and Sections 1 and 2 of the Sherman Act. *U.S. Steel Corp.* v. *International Union, UMWA*, C.A. No. 75-1966 (D.D.C.). The Trustees counterclaimed for the unpaid contributions. There the District Court, without reaching the Section 8(e) issue, determined that the clause did not violate the antitrust laws. *U.S. Steel, supra*, unpublished order of Oct. 5, 1977. The lawsuit was subsequently settled when U.S. Steel paid the full amount of the contributions owed. Kaiser did not join this suit, bring its own suit, or pay its contributions as a result of the outcome there. C.A.J.A. 182.

B. The Opinion Below.

The question thus facing the District Court and then the Court of Appeals was whether "Kaiser's proffered defense of illegality should be entertained." App. 9a. At the outset, the Court noted that "[t]his is not a case

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purposes of summary judgment, Kaiser's version of the facts was to be taken as correct. App. 6a, n. 3. As the Court further noted, however, the relevance of the issue on the legal questions involved is "marginal." *Id.*

in which a contract's illegality is manifest." Moreover, "[t]here is, in fact, good reason to think that the purchase-of-coal clause is consistent with both federal antitrust and federal labor law." App. 7a, n.5. In so stating, the court cited *U.S. Steel Corp.* v. *International Union, UMWA, supra*, and several other cases which support the Trustees' position that, if the Court were to reach the merits, it would find the clause to be lawful. App. 7a-8a.

In any event, the Court concluded that neither the antitrust defense nor the Section 8(e) defense was available to Kaiser here. In rejecting the antitrust defense, the Court relied upon this Court's holding in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), that, where a contract had been fully performed by one party, the other party cannot avoid its part of the bargain by claiming that the agreement is violative of the antitrust laws. In addition, in examining Kaiser's claim further, the Court determined that it was "Kaiser's choice to adopt a strategy of ignoring its contractual obligations to the Trustees and of not pursuing its opportunities for a timely and direct adjudication of its rights." App. 18a. Accordingly, the Court concluded that Kaiser was barred from raising its antitrust claim as a defense to the Trustees' suit for contributions. App. 10a-19a.

Similarly, the Court held that Kaiser's assertion that the purchase-of-coal clause is an unfair labor practice proscribed by Section 8(e) could not serve as a defense to the Trustees' suit. Congress, the Court found, explicitly set forth the available remedies for labor disputes "and apportioned those remedies to distinct tribunals, each with its own special competence." App. 20a. With respect to unfair labor practice claims, Congress determined that the proper forum is not the courts but the National Labor Relations Board. Section 8(e), which "opens with the language that '[i]t shall be an unfair

labor practice' is no exception." *Id.* Thus, the Court concluded that Kaiser was required to present its claim that it "had been victimized by the UMW" to the Labor Board. App. 28a. Having failed to do so, Kaiser could not avoid Congress' clear statutory scheme by attempting to have the District Court decide its unfair labor practice claim against the union in the guise of a defense to a contract action brought by the Trustees. App. 30a.

In rejecting Kaiser's illegality defenses, the Court of Appeals noted that it was "join[ing] two other courts of appeals on this question." App. 9a. The Third Circuit, in *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), rejected both the antitrust and the Section 8(e) defenses in another suit brought by the Trustees of the Funds to compel payment of contributions owed under the 1974 Agreement. The Ninth Circuit, in *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), held that an employer could not raise a Section 8(e) defense in a suit brought by trustees of a benefit fund for contributions due to the fund under a collective bargaining agreement.

Having determined that the Trustees were entitled to the contributions sought in the litigation, the Court then affirmed the District Court's award of attorneys' fees pursuant to Section 502(g) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(g). This provision, the Court held, specifically authorizes such awards in suits brought, as this one was, under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). App. 33a-34a.

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case presents two similar issues—neither of which constitutes a novel question for this Court to review.[4] Here, an employer, Kaiser, resists payment of contributions due its employee health and retirement fund on two grounds: (1) that its agreement to pay the contributions violates the antitrust laws, and (2) that the agreement constitutes an unfair labor practice proscribed by the National Labor Relations Act. The Court of Appeals determined that Kaiser was raising its antitrust claim at the wrong time and in the wrong context, and its labor claim against the wrong party and in the wrong forum.

The crux of this case, as the Court of Appeals recognized, is that, contrary to Kaiser's urgings, courts are not authorized to create new remedies for claims either under the antitrust laws or the labor laws—remedies not provided for in the statutes. Thus, in rejecting Kaiser's defenses, the Court of Appeals was doing no more than applying prior decisions of this Court and settled principles of the antitrust and labor laws. For these reasons, neither issue is worthy of review by this Court.

II. REJECTION OF KAISER'S ANTITRUST DEFENSE WAS A PROPER APPLICATION OF *KELLY* v. *KOSUGA* AND RAISES NO ISSUE WARRANTING REVIEW.

Kaiser's initial contention in its petition is that "[i]t has always been the law, until this case, that courts do not enforce illegal contracts * * *." Pet. 6. Kaiser is

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[4] Kaiser also raises an attorneys' fees question that has recently been disposed of by Congress in the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980). See *infra*, pp. 25-26.

correct that the question whether or not a court should enforce a contract that may prove to be unlawful is not a new issue to face this Court. Contrary to Kaiser's assertion, however, the Court has not adopted a uniform rule of non-enforcement. Indeed, the question whether to entertain an illegality defense in a contract action, this Court has concluded, depends upon the circumstances of the particular case.[5]

Thus, where this Court was faced with a contract plainly contrary to public policy, and where refusal to enforce the agreement was necessary "in order to better secure the public against dishonest transactions," this Court has declined to enforce the bargain in a suit brought by one of the persons who was a party to the unlawful scheme. *McMullen* v. *Hoffman*, 174 U.S. 639 (1899). See discussion by the Court of Appeals at App. 13a, n. 7.

On the other hand, where two parties have entered into a contract for the purchase and sale of certain goods and one party has delivered the goods, this Court has refused to excuse the buyer from performing his part of the bargain on the ground that the contract violated the antitrust laws. This is the holding of *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), where this Court rejected a buyer's antitrust defense in a suit brought by a seller to recover the purchase price of goods sold and delivered. The Court stated:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has

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[5] As explained by the Court of Appeals here, there is a "hoary maxim that courts will not enforce an illegal bargain," App. 15a, but this rule, "like many other maxims, [is] only incompletely true. The rule actually employed by the court is both more complex and more sensitive to nuances of legal relationships." *Id.*

been made by a purchaser in an action to recover from him the agreed price of goods sold." *Id.* at 518 (footnote omitted).

The Court recognized in *Kelly* that there could be cases where a judgment giving effect to the contract would itself result in the enforcement of "the precise conduct made unlawful by the [Sherman Act]." *Id.* at 520. Under those circumstances, the Court indicated that the antitrust defense would be entertained. The general rule of *Kelly*, however, is that where a contract has been performed by one side, the non-performing party should not be able to avoid his obligations by arguing that the contract was entered into in violation of the antitrust laws.

The rationale of *Kelly*, as expressed by this Court, is two-fold. First, this Court was concerned that people not be able to get "other people's property for nothing when they purport to be buying it." *Id.* at 520-21. The Court's second reason was more limited. The Court recognized that, in rejecting the antitrust defense, it was not leaving the party raising the defense without a means of remedying the allegedly unlawful act. On the contrary, the Sherman Act provides a fully adequate remedy for antitrust violations—treble damages. Consequently, in rejecting the antitrust defense in the contract action, this Court was only refusing to add nonenforcement as an additional remedy to those already explicitly provided by the Sherman Act. *Id.* at 519.[6]

As the Court of Appeals held below, both the language and rationale of *Kelly* apply to the facts of the instant case:

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[6] This latter message of *Kelly*—that courts should not create new remedies where Congress has provided explicit remedies by statute—is one that this Court has recently reemphasized. Last term in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979), this Court, rejecting the creation of a private right

> "The affirmative defense of antitrust illegality does not lie against a contract that is 'an intelligible economic transaction in itself.' *Kelly*, 358 U.S. at 521. The purchase-of-coal clause, as part of the overall compensation for those covered by the 1974 Agreement, meets this test. The contract has been fully preformed by the members of the bargaining unit; they are entitled to the full measure of their bargained-for consideration. [Citations omitted.]" App. 13a-14a.[7]

Moreover, as the Court of Appeals recognized, "[i]f Kaiser truly believed the purchase-of-coal clause would not withstand judicial scrutiny, it did not have to wait for others to act." App. 18a. The antitrust laws afforded Kaiser a fully adequate remedy. It could have filed a declaratory judgment action against the UMWA to have the purchase-of-coal clause declared unlawful. It chose not to do so. Having made that choice, the courts should not create a new statutory remedy for Kaiser. *Kelly*, *supra*, 358 U.S. at 519.

In short, the decision of the Court of Appeals does not, as Kaiser suggests, "writ[e] the defense of illegality out of the law." Pet. 11. Rather, the decision does no

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of action under Section 206 of the Investment Advisers Act of 1940, once again made clear that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

[7] Kaiser mischaracterizes *Kelly* when it seeks to distinguish this Court's decision there by arguing that *Kelly* involved the enforcement of a "*lawful* contract [clause] alleged by the defendants to be unenforceable because of 'collateral' illegalities of *other* parts of the parties' [agreement]." Pet. 12, n. 16. On the contrary, this Court rejected an "analysis in terms of 'divisibility'" and treated the whole contract as "an intelligible economic transaction." *Kelly*, *supra*, 358 U.S. at 521. Accordingly, it enforced the purchase agreement, explaining that "it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price." *Id.*

more than to follow the dictates of *Kelly*—in rejecting the presentation of a Sherman Act defense in a contract action where one side has fully performed its part of the bargain. Accordingly, there is no reason for review by this Court.

III. THE HOLDING BELOW THAT KAISER'S UNFAIR LABOR PRACTICE DEFENSE IS WITHIN THE NLRB'S EXCLUSIVE JURISDICTION IS CORRECT AND PRESENTS NO ISSUE WARRANTING REVIEW.

In addition to its antitrust defense, Kaiser sought to interpose in this litigation the defense that the purchase-of-coal clause violates Section 8(e) of the National Labor Relations Act. The Court of Appeals properly refused to entertain this defense and that holding presents no issue warranting review by this Court.

A. The Court of Appeals Properly Rejected Kaiser's Section 8(e) Defense.

1. *Kaiser's 8(e) Claim Falls Within the Exclusive Jurisdiction of the NLRB.* Section 8(e) of the National Labor Relations Act provides that "[i]t shall be an unfair labor practice" for a union and an employer to enter into a "hot cargo" agreement, that is, an agreement that prohibits a neutral employer from doing business with another employer with whom the union has a direct dispute. As with other unfair labor practices, the mechanism for enforcement is through the National Labor Relations Board, pursuant to Section 10 of the NLRA, 29 U.S.C. § 160. It is well-settled that this enforcement mechanism, expressly established by statute, provides the exclusive remedy for unfair labor practice claims. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

2. *The Board's Jurisdiction Could Not Be Circumvented by Raising the Claim as a Defense to a Contract*

Action. Kaiser determined not to present to the Board its claim against the *UMWA* that the purchase-of-coal clause violates Section 8(e). Instead, it sought to avoid the Board's exclusive jurisdiction by raising its claim as a defense when *the Trustees* brought this contract action. The Court of Appeals, looking to the language, structure and policy of Section 8(e) and the NLRA, ruled that Kaiser's effort to circumvent the NLRB must fail. The Court found that "Congress added Section 8(e) to the labor law as part of a wider effort to strengthen and clarify the law's existing prohibitions against 'secondary boycotts' by labor organizations." App. 20a. Prior to the enactment of Section 8(e), the statute provided that it was an unfair labor practice for a union to strike to enforce a "hot cargo" agreement, Section 8(b)(4), 29 U.S.C. § 158(b)(4), but not that it was unlawful to enter into such a contract. Section 8(e) was adopted to close that "loophole." *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 634 (1967).

While Sections 8(e) and 8(b)(4) were both passed by Congress to address the problem of secondary boycotts, the remedies expressly provided by Congress are not the same. Congress determined to single out unfair labor practice charges under Section 8(b)(4), the provision prohibiting strikes to enforce a hot cargo clause, by providing in Section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, that Section 8(b)(4), unlike other unfair labor practices, is enforceable in the federal courts. In enacting Section 8(e), on the other hand, it did not give the federal courts jurisdiction. As the Court of Appeals explained, "Congress well knew the disruptive potential of judicially created remedies for labor disputes" and "[a]ccordingly, Congress carefully defined the remedies that might be sought for violations of section 8(e) * * *." App. 20a. The

remedy Congress defined for alleged Section 8(e) violations is the filing of a charge with the NLRB.

Having examined the statutory scheme and found that Congress did not create a judicial remedy for the enforcement of Section 8(e), but rather included it among the unfair labor practices to be enforced by the Board, the Court of Appeals held: "When Congress has spoken so directly on the remedies to be provided for statutory violations, it is not for the courts to add remedies of their own." App. 21a. Thus, the Court refused to hear Kaiser's section 8(e) defense, holding that "[t]o permit an employer to assert a Section 8(e) defense in a suit like this would add the remedy of contract avoidance to the other forms of relief which the statute expressly provides." App. 22a.[8]

3. *The Court of Appeals Decision Is Consistent with Prior Decisions of this Court.* As the Court of Appeals concluded, this decision is fully consistent with the prior decisions of this Court cited in Kaiser's petition, *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962), and *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). Pet. 18-20.

Connell was a lawsuit filed by an employer against a union seeking a determination that an agreement that it had signed under duress violated the Sherman Act. The union defended on the ground that its conduct was

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[8] The language in Section 8(e) providing that a "hot cargo" agreement would be unenforceable and void, the Court held, did not require a contrary result. The Court pointed out "the existence of such a statutory declaration does not imply that contracts of a certain sort can never be enforced under any circumstances." Here, after closely reviewing the legislative history, the Court determined that the "unenforceable and void" language was designed to prevent a union from obtaining "specific performance" of a "hot cargo" clause. It did not create a separate judicial remedy for employers. App. 22a-23a.

protected from the antitrust laws by the "construction industry proviso" to Section 8(e), which specifically authorized the sort of agreement at issue. In order to decide whether the agreement fell within the proviso, this Court ruled that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626. Kaiser argues that this language gives the federal courts jurisdiction over its Section 8(e) defense.

Kaiser's argument, however, fails to recognize that the "collateral" labor issue to be resolved in *Connell* was quite different from the "collateral" issue here. In *Connell*, the union was not claiming that an unfair labor practice had been committed. On the contrary, the union was asserting that its conduct was protected by the construction industry proviso of Section 8(e). The question raised by the union could not have been addressed by the Labor Board because it does not have jurisdiction to decide the scope of Section 8(e) absent a charge that an unfair labor practice has occurred. As a consequence, there was no mechanism for the administrative adjudication of the "collateral labor law issue" which the Court undertook to resolve. Accordingly, since Kaiser, unlike Connell, had an administrative remedy available to it, the Court of Appeals concluded that assertion of jurisdiction by the federal courts was unwarranted. App. 28a.

Similarly, assertion of jurisdiction over Kaiser's 8(e) defense was not warranted by *Smith* v. *Evening News Ass'n*, *supra*, or *Motor Coach Employees* v. *Lockridge*, *supra*. In these cases, suit was brought under Section 301 of the LMRA[9] for breach of a collective bargaining agreement. The defendants in both cases argued in de-

[9] Section 301 of the LMRA, 29 U.S.C. § 185, gives the federal courts jurisdiction over suits for violation of contracts between an employer and a labor organization.

fense to the contract actions that the courts did not have jurisdiction to hear the suits because the breach of contract alleged also constituted an unfair labor practice under the NLRA, and that, therefore, the matters had to be referred to the NLRB.

The Court, however, rejected that defense on the ground that the federal courts are not precluded from deciding contract claims at issue under Section 301 simply because the breach might *also* be an unfair labor practice. As this Court held in *Smith* v. *Evening News Ass'n*: "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." 371 U.S. at 197.

These Section 301 cases, as the Court of Appeals found, are quite different from the dispute at bar. App. 25a-26a. There, the courts were not asked to determine whether certain conduct constituted an unfair labor practice, *i.e.*, a violation of Section 8 of the NLRA. Rather, the courts were asked to decide only whether a contract had been breached—and that, of course, is a matter the federal courts had unquestioned jurisdiction to decide. Here, on the other hand, Kaiser is asking specifically for a determination that the purchase-of-coal clause violated Section 8(e). Unlike these Section 301 cases where the legality of the contract clause was not questioned and only its breach was at issue, it is the clause itself that is being attacked as an unfair labor practice.[10]

In sum, the Court of Appeals ruling that Kaiser's Section 8(e) defense falls within the exclusive jurisdiction of the NLRB is correct; it is consistent with this

[10] The Court of Appeals decision in this respect is consistent with the analysis set forth by the Ninth Circuit in *Atchison, Topeka & Santa Fe Ry.* v. *Locals 70, 85, and 315 of the International Brotherhood of Teamsters*, 511 F.2d 1193 (9th Cir. 1975).

Court's decision in *Connell* and with the Section 301 cases *Smith* and *Motor Coach Employees*; and it raises no issue for review by this Court.

B. The Court of Appeals' Construction of Section 8(e) Is Consistent with Labor Policy and the Constitution.

Kaiser contends that the Court of Appeals' ruling, which precluded presentation of its unfair labor practice defense to the court in the first instance, raises "grave constitutional problems." Pet. 21. Kaiser emphasizes that under the enforcement scheme of the NLRA, an unfair labor practice charge may never reach the courts because the General Counsel of the NLRB has unreviewable discretion to decline to issue a complaint. *Id.* Thus, Kaiser concludes, courts may have to adjudicate parties' rights under arguably unlawful agreements while not being able to determine the legality of the contract provisions at issue. This restraint upon the courts, Kaiser asserts, is unconstitutional. Pet. 22.

Kaiser's constitutional concerns, however, are based upon a misunderstanding of the statutory scheme of the NLRA. Kaiser's argument assumes that the NLRA created private rights respecting the enforcement of unfair labor practice charges. But as this Court has long held, "'[n]o private right of action is contemplated [by the NLRA]. Essentially the unfair labor practices listed [in Section 8] are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint.'" *Amalgamated Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267 (1940), quoting H.R. Rep. No. 972, 74th Cong., 1st Sess. 21. *See also National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940). The constitutionality of this exclusive jurisdiction procedure was specifically upheld by this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

The theory and structure of the NLRA enforcement scheme was explored by this Court in *Amalgamated Workers*. The NLRA was enacted by Congress "in the interest of interstate commerce" to safeguard the right of employees to take "united action" and to "seek to make appropriate collective action 'an instrument of peace rather than of strife.'" 309 U.S. at 264. The enforcement mechanism, this Court then explained, was tailored to the purpose of the Act:

> "To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. * * * Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." *Id.*

The remedy that Congress determined to provide was placed in the hands of the National Labor Relations Board. Further, as the Court explained, the Board was to be not only the forum for the presentation of unfair labor practice charges, but also the sole determinant of whether an unfair labor practice had occurred:

> "Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose." *Id.*

After examining the text of the statute, this Court determined:

> "The Act then sets forth a definite and restricted procedure. A charge of an unfair labor practice may be presented to the Board, but the person or group making the charges does not become the actor in the proceeding. It is the Board, and the Board

> alone or its designated agent, which has power to issue its complaint against the person charged with the unfair labor practice." *Id.* at 264-65.

Thus, the Court concluded:

> "[I]t is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. *The Board as a public agency acting in the public interest, not any private person or group, * * * is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.*" *Id.* at 265 (emphasis added).

In short, the NLRA provides that it is for "the Board alone or its designated agent" to determine whether to pursue an unfair labor practice charge. Moreover, Section 3(d) of the Act specifically delegates to the General Counsel "final authority, on behalf of the Board" to investigate and issue unfair labor practice complaints. 29 U.S.C. § 153(d). As noted on at least two occasions by this Court, the General Counsel's decision not to issue a complaint is unreviewable. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975). The reason for this rule is essentially the same as the reason underlying the entire statutory scheme, that is, that the Act is not designed to provide for individual relief but to protect broader public rights. As this Court explained in *Sears, Roebuck & Co.*:

> "* * * Congress has delegated to the Office of General Counsel 'on behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed * * *. In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides

> not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration." 421 U.S. at 138-39.[11]

Kaiser has sought to avoid this statutory scheme, which does not afford employers private enforcement rights, by ignoring it. Then, belatedly, Kaiser argues that the Court of Appeals' decision leaves "employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review." Pet. 21. It was not, however, the Court of Appeals that left Kaiser without a forum. Rather it was the terms of the statute, the constitutionality of which was long ago upheld, *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, and it was Kaiser's own decision to refrain from pursuing the remedy that Congress did provide. Kaiser's "grave constitutional problems" are, accordingly, unwarranted.

In any event, Kaiser's constitutional concerns should not be entertained at this stage of the proceeding. Kaiser is presenting its constitutional argument to this Court for the first time. Although it was open to Kaiser in

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[11] Chief Justice Hughes recognized that this scheme of enforcement is not unique to the labor laws. *Amalgamated Workers* v. *Consolidated Edison Co.*, *supra*, 309 U.S. at 268. A similar rule applies, for example, in connection with Section 5 of the Federal Trade Commission Act. Under Section 5, "[a] person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final." *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25 (1929).

the District Court and in the Court of Appeals to challenge the Trustees' interpretation of the NLRA on the ground that it would render the statute unconstitutional, it did not do so. It is well-settled that this Court will not consider issues neither raised before nor considered by the District Court or the Court of Appeals. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *California* v. *Taylor*, 353 U.S. 553, 557 n. 2 (1957).

C. There Is No Conflict Among the Circuits Meriting Review by this Court.

The question presented in this case—whether employers can defend a suit for contributions by the trustees of an employee health and retirement fund on the ground that the contribution provision in the collective bargaining agreement is unlawful under Section 8(e) of the NLRA—has been decided in three Circuits. In addition to the decision below, the other two Circuits have held that the employer's unfair labor practice claim was not a proper defense before the district court. *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979); *Waggoner* v. *R. McGray Inc.*, 607 F.2d 1229 (9th Cir. 1979).

The question was first raised in *Huge* v. *Long's Hauling Co.*, *supra*. There the Third Circuit rejected the employer's 8(e) defense in a suit brought by the Trustees of the UMWA Health and Retirement Funds squarely on the ground that "[u]nder *Garmon* [the] allegations of unfair labor practices and violations of section 8(e) were not proper defenses before the district court." 590 F.2d at 461.[12]

[12] Kaiser suggests that a contrary result had been reached by the Third Circuit in *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (1967), *cert. denied*, 390 U.S. 947 (1968). Pet. 24. The Third Circuit, however, never reached the question. The District Court in *Seanor*, on the other hand, reached the same conclusion the Third Circuit

The other Court of Appeals that has addressed the issue is the Ninth Circuit. In *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), the Court similarly rejected the employer's 8(e) defense in a suit for contributions brought by trustees of a pension fund. The Court ruled:

> "As the Supreme Court explained in *Garmon*, 'the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.' [Citations omitted.] *Respect for this congressional determination requires us to hold that district courts may not decide, independent of the NLRB, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a section 301 action.*" 607 F.2d at 1235 (emphasis added).

Since *Waggoner*, the Ninth Circuit has reaffirmed its position on this precise issue.[13]

Nevertheless, Kaiser asserts that the decision of the Court of Appeals here is in conflict with the law of the First and Second Circuits, citing four cases. *Local Lodge*

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later adopted in *Huge* v. *Long's Hauling*. The District Court held:

> "[W]e do not find it within the jurisdiction of this court to pass upon the allegation that the entire Welfare and Retirement Clause of the Agreement is an unfair labor practice, and thus illegal. This is a matter within the exclusive jurisdiction of the National Labor Relations Board. [Citations omitted.]" *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456, 460 (W.D. Pa. 1966).

[13] In *Orange Belt District Council of Painters No. 48* v. *Maloney Specialities, Inc.*, 106 LRRM 2183 (9th Cir. 1980), the Ninth Circuit reaffirmed its decision in *Waggoner* in a dispute between a union and an employer and rejected the employer's 8(e) defense.

No. 1898 of Dist. No. 38 of the IAM v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960); *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); and *Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbuilding Workers of America, Local 39*, 344 F.2d 107 (2d Cir. 1965). Three of the Court of Appeals decisions do not reach or decide the issue presented here. The fourth case, *Todd Shipyards*, arose in another context, the union's right to arbitrate disputes under the contract, and rests on a misapplication of *Smith* v. *Evening News Ass'n*, *supra*.

The First Circuit case, *Local Lodge No. 1898*, neither raised nor resolved the question at issue here. There, the Court was asked to determine whether a union security clause in a collective bargaining agreement had been breached by the employer. It is true, as Kaiser contends (Pet. 24), that the District Court declared that it would not order enforcement of the clause had it determined that such an order would result in the commission of an unfair labor practice. However, that Court ruled that, in any event, no enforcement order was called for because the clause had not been breached. The Court of Appeals, addressing only the question of the contract breach, affirmed. The First Circuit never reached the unfair labor practice issue.

In the Second Circuit, *Carrier Air Conditioning* involved an appeal from the decision of the NLRB upholding a subcontracting clause in a collective bargaining agreement in the face of an 8(e) attack by an employer. Thus, *Carrier* is merely an illustration of the appropriate course for employers to follow who believe they have entered into an agreement that violates 8(e).

In both *United Optical Workers Union* and *Todd Shipyards*, on the other hand, the question of the proper

forum for resolving an unfair labor practice dispute under 8(e) arose in the context of a collective bargaining agreement that called for arbitration of differences over the contract between the union and the employer. In *United Optical Workers Union* the Court of Appeals determined that under the terms of the collective bargaining agreement, a dispute as to whether a contract clause was an unfair labor practice under 8(e) was itself committed by the parties to arbitration. Consequently, if the issue had been properly raised on appeal, the Court made clear, it would have held that the question "[w]hether the subcontracting clause violate[d] section 8(e) is at least initially in the exclusive province of the arbitrator"—not the District Court. Because the union had not cross-appealed, however, the Court of Appeals concluded it had no power to pass on the question. In short, the appellate court never reached or decided the issue presented here. 500 F.2d at 224.

The final Second Circuit decision, *Todd Shipyards*, rests upon a misapplication of the then-recent decision in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). As discussed above, pp. 14-16, *supra*, *Smith* held that the fact that conduct alleged to be in breach of a labor agreement might *also* constitute an unfair labor practice would not deprive the federal court of jurisdiction under Section 301 of the LMRA to decide the contract claim. That was not the case in *Todd*, where the alleged breach of contract was the employer's refusal to arbitrate which was not asserted also to be an unfair labor practice. Rather, the unfair labor practice at issue was raised by the employer as a defense to the breach of contract claim.

In short, *Smith* has no bearing on a case such as *Todd* where the unfair labor practice is not co-extensive with the Section 301 claim, but instead is raised as a defense to it. *Todd*, we believe, therefore, was wrongly decided. Our analysis of *Todd* is confirmed by the fact that this

case, now 16 years old, has never been relied upon by any other court of appeals—nor by the Second Circuit itself—as precedent for the ruling Kaiser seeks here.[14]

In sum, only one Court has reached a conclusion contrary to the decisions of the District of Columbia Court of Appeals, the Third Circuit, and the Ninth Circuit. That arguably inconsistent case in the Second Circuit arose in the context of a dispute over the right to arbitration, rested on a misapplication of *Smith* v. *Evening News Ass'n*, and was decided over a decade before the recent line of cases supporting the Trustees' position here. Given the decisions of the Third, Ninth and District of Columbia Circuits, the Second Circuit, if faced with the question again, might well reconsider its prior decision. Consequently, there is no conflict among the Courts of Appeals requiring resolution by this Court.

IV. THE AWARD OF ATTORNEYS' FEES WAS AUTHORIZED BY ERISA AND DOES NOT MERIT REVIEW.

This case was brought by the Trustees both under Section 301 of the LMRA and Section 502 of ERISA. C.A.J.A. 13. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3) (1976), specifically provides that a civil action may be brought

> "by a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan."

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[14] In fact, when the *Smith* issue was analyzed by the Ninth Circuit, it specifically rejected the approach taken in *Todd. Atchison, Topeka & Santa Fe Ry.* v. *Locals 70, 85, and 315 of the International Brotherhood of Teamsters*, 511 F.2d 1193 (9th Cir. 1975).

Section 502(g) of the Act in turn authorizes the district court to award attorneys' fees "[i]n any action under this title by a . . . fiduciary." 29 U.S.C. 1132(g).[15]

As the Court of Appeals pointed out, "[i]n numerous cases, both within this circuit and elsewhere, district courts have allowed suits like this to proceed under both LMRA and ERISA, and have awarded attorneys' fees pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g)." App. 34a.[16]

To the extent, however, that there could be any doubt as to the entitlement of trustees to attorneys' fees in securing payment of delinquent contributions to a health and retirement plan, such doubt was resolved with the passage of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980). Section 306 of this statute, 94 Stat. 1295, adds a new Section 515 to Title I of ERISA and amends Section 502 as follows:

> Section 515. "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

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[15] The "title" referred to in Sections 502(a)(3) and (g) is Title I of ERISA, "Protection of Employee Benefit Rights."

[16] *See e.g.*, the cases cited by the Court of Appeals: *Mullins* v. *Reitz Coal Co.*, C.A. No. 78-0715 (D.D.C. Mar. 23, 1979); *Huge* v. *Reid*, 468 F. Supp. 1024 (N.D. Ala. 1979), *aff'd mem.*, 615 F.2d 916 (5th Cir. 1980); *Huge* v. *Maximeadows Mining Co.*, 459 F. Supp. 267 (N.D. Ala. 1978); *Bugher* v. *Southland Fabricators and Erectors, Inc.*, 452 F. Supp. 870 (W.D. La. 1978); *Sheet Metal Workers Pension Fund* v. *Young's Roofing, Inc.*, C.A. No. 77-1849 (D.D.C. May 3, 1978); *Huge* v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978); *IAM National Pension Fund* v. *Ward La France Truck Corp.*, C.A. 77-1206 (D.D.C. Feb. 1, 1978); *Bugher* v. *Frash*, 98 LRRM 3010 (S.D. Ind. 1977). App. 34a, n. 14.

Section 502(a) was amended by adding the following new paragraph:

> "(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> "(A) the unpaid contributions,
>
> "(B) interest on the unpaid contributions,
>
> * * * *
>
> "(D) *reasonable attorney's fees and costs of the action, to be paid by the defendant*, and
>
> "(E) such other legal or equitable relief as the court deems appropriate." (Emphasis added.)

Consequently, the Court of Appeals decision—which in any event properly construed Section 502 of ERISA—cannot be said to "encourage other litigants * * * 'to add perhaps unjustified ERISA claims to their suits in the hopes of recovering attorneys' fees * * *.'" Pet. 27. Congress has stated quite plainly that suits for delinquent contributions properly fall within the coverage of ERISA. Trustees, who seek payment of these contributions, Congress has specifically declared, are entitled to recover the attorneys' fees they incur in connection with any such litigation. We believe the 1980 amendments of Sections 515 and 502(a)(2) should be given effect in this pending case. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). However, whether or not they apply, their enactment means that the question presented here will not arise again in the future and, accordingly, deprives the attorneys' fee issue of any general interest warranting review on certiorari.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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